tarily used it, the defendant not having assisted her in the act of taking it, therefore he is not liable for the injury caused by the use of it." In *Holleman* v. *Harward, supra,* the contention is answered thus, "And it seems to be the most reasonable proposition of law that whoever wilfully joins with a married woman in doing an act which deprives her husband of her services and her companionship is liable to the husband in damages for his conduct. And the defendant owed to the plaintiff the legal duty not to sell to his wife opium." *Flandermeyer* v. *Cooper,* 85 Oh. St. 327, 40 L. R. A. N. S. 360 permitted a recovery in favor of a wife for sale of drugs to her husband. The reasoning in the cases cited *supra* is clearly sustained by cases involving the alienation of the wife's affections where she is a willing party. *Rhinehart* v. *Bills,* 82 Mo. 534. Also by cases for crim. con. where the adulterous wife consents. *Wilton* v. *Webster,* 7 C. & P. 198; *Chambers* v. *Canefield,* 6 East 244.

PARTITION—OIL LANDS NOT DIVISIBLE IN KIND.—Plaintiff brought an action for the partition in kind of a tract of land supposed to contain oil, but upon which no oil, gas or other minerals had as yet been discovered. *Held,* two judges dissenting, that the property was not of a nature that would admit of partition in kind. *Gulf Refining Co.* v. *Hayne,* (La. 1916) 70 So. 509.

At common law the co-parcener alone had the right to compulsory partition. Joint tenants and tenants in common were given the right to a writ of partition by 31 Hen. VIII, c. 1 and 32 Hen. VIII, c. 32 (1540). 2 BLACKSTONE, COMM. 185, 189, 194. Equity assumed jurisdiction in cases of partition sometime about the reign of Elizabeth. 1 SPENCE, EQUITY, 654. A co-tenant, when his title is clear, is entitled to partition as a matter of right. *Willard* v. *Willard,* 145 U. S. 116; *Martin* v. *Martin,* 170 Ill. 639; *Brevoort* v. *Brevoort,* 70 N. Y. 136; *Crocker* v. *Cotting,* 170 Mass. 68, 70. As a general rule, all property that is capable of being held in co-tenancy is subject to compulsory partition. *Hanson* v. *Willard,* 12 Me. 142. This rule, however, has its exceptions. Partition will not be decreed when it would be contrary to public policy, as in the case of a railroad (*Railroad Co* .v. *Railroad Co.,* 38 Ohio St. 614), or when it would offend the public sense of propriety, as in the case of a church or burial ground (*Brown* v. *Lutheran Church,* 23 Pa. St. 495). Ordinarily there can be no partition of mines. *Mountjoy's Case,* Godb. 17; *Lenfers* v. *Kenke,* 73 Ill. 405; *Adams* v. *Briggs Iron Co.,* 7 Cush. 361, 365; *Wilson* v. *Bogle,* 95 Tenn. 290; *Conant* v. *Smith,* 1 Aiken (Vt.) 67; *Kemble* v. *Kemble,* 44 N. J. Eq. 454. These cases proceed on the theory that the situation is such that a division of the property would necessarily result in inequality. However, partition will be decreed in such cases if it is practicable; as when the lands contain solid minerals and the mines have not been opened (*Hughes* v. *Devlin,* 23 Cal. 502; *Rainey* v. *Frick Coke Co.,* 73 Fed. 389) or when the mineral is so situated that a fair division can be made by dividing the surface of the land (*Dall v. Confidence Mining Co.,* 3 Nev. 485; *Canfield* v. *Ford,* 28 Barb. (N. Y.) 336). The surface can be separated from the underlying minerals and distinct titles made to each. *Ames* v. *Ames,* 160 Ill. 599. See *Byers* v. *Byers,* 183 Pa. St. 509. In the case of oil and gas,

it would seem from the analogy to solid minerals that partition should not be decreed. Especially is this true when the petitioners do not own the surface. A partition, under such circumstances, of the gas or oil, separate from the surface, by alloting it by sections of the surface, would be void. *Hall* v. *Vernon,* 47 W. Va. 295. However, so long as the presence of oil or gas on the premises has not been determined, it is hard to see why the land should not be divisible in kind. "There is no doubt," says an authority, "that an action of partition lies to divide undeveloped and supposable oil or gas lands, just as it does in the case of lands containing solid materials; for it cannot be known, owing to the peculiar character or oil or gas as a mineral, whether the land to be divided is actual gas or oil land; and to refuse partition on the theory that it may be, would be for the court to enter upon the domain of mere speculation or supposability." THORNTON, OIL AND GAS, § 277. Following this line of reasoning, it would seem that the principal case is wrong.

SALES—ACCEPTANCE WITH KNOWLEDGE OF BREACH OF EXPRESS WARRANTY AS WAIVER OF BREACH.—Defendant contracted to buy brick from the plaintiff at $17.25 per M, the brick to be shipped in installments; there was an express warranty that the brick be of a certain kind and grade. Plaintiff shipped an inferior brick which ordinarily sold at $13.75 per M. Defendant accepted and used them without notifying plaintiff or offering to return them. Plaintiff sued for the purchase price at $17.25 per M and defendant sought to set-off the difference in price between the brick contracted for and those delivered. The set-off was allowed, the court holding the express warranty was not waived for purposes of set-off at least, by defendant's accepting and using the brick without notifying the plaintiff of the inferior quality before the action. *Peterson* v. *Denny-Renton Clay & Coal Co.,* (Wash. 1916) 154 Pac. 123.

Ordinarily a general express warranty will not be construed to cover obvious defects. WILLISTON, SALES, 271-2. But the modern authorities with few exceptions hold that a special express warranty survives acceptance even as to defects known to the vendee at the time of acceptance, for purposes of set-off and counterclaim, although not for purposes of recission. *Harris* v. *Marsh,* 217 Fed. 555, 133 C. C. A. 407; *Weed* v. *Dyer,* 35 Ark. 155, 13 S. W. 592; *Underwood* v. *Wolf,* 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; *North Alaska Salmon Co.* v. *Hobbs, Wall & Co.,* 159 Cal. 380, 113 Pac. 870, 35 L. R. A. (N. S.) 501; *Davidson Bros.* v. *Smith,* 143 Ia. 124, 121 N. W. 503; *Graff* v. *D. M. Osborne Co.,* 56 Kans. 162, 42 Pac. 704; *McCormick Harvesting Machine Co.* v. *Fields,* 90 Minn. 167, 95 N. W. 886; *Eversole* v. *Hanna,* 184 Mo. App. 445, 171 S. W. 25; *Eichbaum* v. *Caldwell Bros. Co.,* 58 Wash. 163, 108 Pac. 434; 5 MICH. L. REV. 298. The principal case would probably have been decided the same way that it was by any of the courts adhering to this general rule, even though defendant knew of the defects before acceptance. The Georgia courts, however, hold that such a warranty is waived for all purposes where the vendee accepts with knowledge of the defects. *Springer* v. *Indianapolis Brewing Co.,* 126 Ga. 321, 55 S. E. 53;